

The issues are: (1) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$265.70, as she was paid compensation at the augmented rate for the period December 18, 2006 to October 27, 2007 while she had no dependents; and (2) whether it properly found appellant at fault in the creation of the overpayment.

FACTUAL HISTORY

Appellant, a 30-year-old data transcriber, injured her lower back on April 29, 1988 while pushing heavy cases of mail. The Office accepted her claim for lumbosacral strain and commenced paying her compensation for total disability.

By letters dated November 1, 2006, the Office requested updated information regarding appellant's financial and personal status. It enclosed an affidavit of earnings and employment (Form EN1032) which advised that "a claimant who has one or more dependents is paid compensation at 75 percent of the applicable rate" and that she might claim compensation for a dependent spouse who lived with her, or to whom she paid regular support if she did not live with him. The Office instructed appellant to report immediately any change in the status of her dependents. Appellant completed the form and submitted it to the Office on November 27, 2006; on the form she claimed her husband as a dependent for compensation purposes. In an October 18, 2007 worksheet, the Office indicated that it had been paying appellant compensation at the augmented or 75 percent rate. On December 18, 2006 appellant was divorced from her husband.

In an October 18, 2007 worksheet, the Office adjusted appellant's compensation to the statutory basic 66 2/3 rate as of October 27, 2007 as she was no longer married and, therefore, had no dependents.

By notice dated November 2, 2007, the Office advised appellant of its preliminary finding of a \$265.70 overpayment in compensation as she was paid augmented compensation from December 18, 2006, the date she was divorced from her husband, through October 27, 2007 although she had no dependents. It determined that appellant was at fault in creation of the overpayment as she should have known that she could not claim her husband as a dependent and receive compensation at the augmented rate after she was divorced. The Office afforded appellant 30 days in which to submit arguments, evidence and financial information and to request a telephone conference or prerecoupment hearing. Appellant did not complete and submit this questionnaire to the Office.

By decision dated December 12, 2007, the Office finalized its preliminary determination that a \$265.70 overpayment of compensation had been created. It found appellant at fault in creation of the overpayment and directed recovery through withholding \$25.00 from appellant's continuing compensation payments every four weeks.

LEGAL PRECEDENT

The basic rate of compensation under the Federal Employees' Compensation Act¹ is 66 2/3 percent of the injured employee's monthly pay.² When the employee has one or more

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8105(a).

dependents as defined by the Act, she is entitled to have her compensation augmented at eight and one-third percent.³

The basic statutory rate of compensation under the Act⁴ is 66 2/3 percent of the injured employee's monthly pay.⁵ Under section 8110 of the Act, a claimant is entitled to augmented compensation at 75 percent of his weekly pay if he has one or more dependents.⁶ Under the Act, a wife may be a dependent if she is a member of the same household as the employee or receives regular contributions from the employee for her support or the employee has been ordered by a court to contribute to her support.⁷

ANALYSIS -- ISSUE 1

The Board finds that the Office properly determined that appellant was not entitled to augmented compensation after her divorce became final on December 18, 2006 as she had no qualifying dependents. Her former husband is no longer considered a qualifying dependent under section 8110(a)(2) of the Act after the divorce went into effect. Appellant continued to receive compensation at the augmented 75 percent rate until October 27, 2007. Since she no longer had any dependents as defined under the Act, the Office reduced appellant's compensation to the two-thirds rate as of October 27, 2007. The Office calculated that an overpayment in the amount of \$265.70 was created, representing the difference between the \$2,301.09 she was paid at the 75 percent rate, based on a weekly compensation rate of \$207.00 and the \$2,035.39, at the 66 2/3 percent rate, based on a weekly compensation rate of \$183.00 to which she was entitled. The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$265.70 as she was paid compensation at the augmented rate for the period December 19, 2006 to October 27, 2007, when she had no dependents.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of the Act provides that, where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

³ *Id.* at § 8105(b).

⁴ *Id.* at §§ 8101-8193.

⁵ *Id.* at 8105(a).

⁶ *Id.* at § 8110.

⁷ *Id.* at 8110(a)(2).

In determining whether an individual is not “without fault” or, alternatively, “with fault,” section 10.433 of Title 20 of the Code of Federal Regulations states, in pertinent part, that an individual is with fault in creation of an overpayment who: “(1) [m]ade an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) [f]ailed to furnish information which the individual knew or should have known to be material; or (3) [a]ccepted a payment which he or she knew or should have known to be incorrect.” Whether or not the Office determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. In applying the tests to determine fault, the Office applies a “reasonable person” test.

ANALYSIS -- ISSUE 2

In this case, the Office applied the second standard in determining that appellant was at fault in creating the overpayment. In its preliminary determination of November 2, 2007 and its December 12, 2007 decision, it found that appellant should have been aware that her husband could no longer be considered a dependent after finalization of their divorce. Appellant had completed numerous EN1032 forms since she began receiving compensation in 1989. Each of the forms indicated that the basic statutory rate of compensation was 66 2/3 percent of the applicable pay rate if the claimant had no eligible dependents or 75 percent of the applicable pay rate if one or more dependents were eligible for compensation. The forms indicated that the claimant might claim additional compensation for a dependent, including a spouse who was a member of his household or to whom regular support payments were made. However, despite the notice regarding dependents on each form, appellant did not report her change in marital status, which she knew would determine her claimed eligible dependents and thus her pay rate. She therefore was able to continue to receive and accept compensation payments at the augmented rate through October 27, 2007. The Board finds that the Office properly found appellant at fault in the creation of the overpayment.

CONCLUSION

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$265.70 as she was paid compensation at the augmented rate for the period December 19, 2006 to October 27, 2007 when she had no dependents. The Board further finds that appellant was at fault in creation of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board